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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

SMA LIQUIDATING
CORPORATION et al.,

Plaintiffs and
Respondents,

v.

LEECH TISHMAN FUSCALDO
& LAMPL, LLP,

Defendant and Appellant.

B287960

(Los Angeles County
Super. Ct. No. ES021524)

APPEAL from an order of the Superior Court of Los Angeles County, William D. Stewart, Judge. Affirmed.

Leech Tishman Fuscaldo & Lampl and Steven M. Taber for Defendant and Appellant.

Jones & Lester, James G. Jones and Matthew W. LaVere for Plaintiffs and Respondents.

Defendant Leech Tishman Fuscaldo & Lampl, LLP (Leech LLP) appeals from an order granting plaintiffs SMA Liquidating Corporation, Jeffrey Sheldon, and Danton Mak's (collectively, SMA) second motion to amend the judgment to award postarbitration attorney's fees and costs, granting \$9,000 in attorney's fees. Leech LLP contends the trial court lacked jurisdiction to consider SMA's motion because the court had previously denied SMA's first motion for attorney's fees and costs made as part of SMA's motion to amend the judgment to add Defendant Leech Tishman Fuscaldo & Lampl, LLC (Leech LLC) as a judgment debtor. The trial court granted the motion to add Leech LLC as a judgment debtor, but denied the request for attorney's fees.¹ Leech LLP contends that because Leech LLC timely appealed from that order, under Code of Civil Procedure section 916² the trial court lacked jurisdiction to decide SMA's second motion. Leech LLP also contends the trial court lacked jurisdiction because SMA's motion was an untimely and procedurally defective motion for reconsideration under section 1008.

The trial court's consideration of SMA's second request for attorney's fees and costs was within the court's power to reconsider its prior ruling on its own motion pursuant to *Le Francois v. Goel* (2005) 35 Cal.4th 1094, 1108-1109 (*Le Francois*), and that Leech LLC's appeal from modification of the judgment

¹ We affirm the trial court's order on the first motion to amend the judgment in a separate opinion. (*SMA Liquidating Corp. v. Leech Tishman Fuscaldo & Lampl, LLC* (May 13, 2019, B285389) [nonpub. opn.])

² All further undesignated statutory references are to the Code of Civil Procedure.

to include Leech LLC as a judgment debtor did not appeal the trial court's denial of attorney's fees. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Asset Purchase Agreement, Arbitration Award, and Judgment*

On July 15, 2014 Leech LLP entered into an agreement to purchase certain assets from law firm Sheldon Mak & Anderson, PC. Subsequent to the agreement, Sheldon Mak & Anderson, PC ceased doing business in the practice of law, but continued to operate as SMA Liquidating Corporation for the purpose of liquidating the law firm. When Leech LLP failed to pay the purchase price under the agreement, SMA initiated an arbitration proceeding on June 10, 2015. The parties settled, and on July 6, 2015 entered into an amendment to their agreement. As part of the amendment, Leech LLP signed a promissory note in the amount of \$67,503, plus interest, with a specific payment schedule. The promissory note provided, "In the event any payment under the Note is not paid when due, the Maker agrees to pay, in addition to the principal and interest hereunder, all reasonable expenses (including legal) incurred in collecting."

When Leech LLP failed to make the required payments under the amendment, SMA declared a default and again initiated arbitration proceedings. On February 27, 2017 the arbitrator awarded SMA \$91,422.39 against Leech LLC. On March 21, 2017 the arbitrator modified the award to substitute Leech LLP as judgment debtor for Leech LLC.

On June 9, 2017 SMA petitioned the trial court to confirm the arbitration award. On July 6, 2017 the trial court issued an

order confirming the arbitration award and entered judgment for SMA against Leech LLP for \$91,422.39, less a partial payment of \$27,000.

B. SMA's First Motion To Amend the Judgment

On August 7, 2017 SMA moved to amend the judgment pursuant to section 187 to add Leech LLC as a judgment debtor on the theory it was the alter ego of Leech LLP, and to award postarbitration attorney's fees and costs against Leech LLP and Leech LLC (first motion for attorney's fees).³ SMA requested \$11,329.50 in attorney's fees and costs incurred since February 27, 2017 "in memorializing and enforcing the judgment against the proper entities." SMA argued the attorney's fees and costs were specifically allowed by the asset purchase agreement. SMA attached a declaration from James G. Jones, attorney for SMA, stating he and his staff spent 32 hours on postarbitration matters, and anticipated spending four additional hours on the motion, at a rate of \$400 per hour. Leech LLC's opposition did

³ On October 12, 2018 we granted SMA's motion to augment the record (filed by SMA as a request for judicial notice) with SMA's August 7, 2017 motion to amend the judgment, the superior court's September 8, 2017 minute order, and the superior court's purported October 17, 2017 tentative ruling on SMA's second motion to amend the judgment. Because the trial court adopted a modified tentative ruling on the second motion to amend the judgment on December 8, 2017, we do not consider the October 17, 2017 tentative ruling submitted by SMA. On our own motion we augment the record also to include Leech LLC's September 1, 2017 opposition to the first motion for attorney's fees. (Cal. Rules of Court, rule 8.155(a)(1)(A).)

not address the requested attorney's fees and costs. Leech LLP did not oppose the motion.

After a hearing, on September 8, 2017 the trial court adopted its written tentative ruling in a minute order, granting SMA's motion to amend the judgment to add Leech LLC as a judgment debtor, but denying SMA's motion to the extent it requested postarbitration attorney's fees and costs. The court found SMA "offer[ed] no legal argument or analysis that identifie[d] legal authority for the Court to amend the judgment, which is based on the arbitration award, in order to add attorney's fees." The court also found SMA "ha[d] not provided sufficient facts to demonstrate that the amounts requested [we]re reasonable." The minute order noted the parties waived notice of entry of the order.

On September 27, 2017 Leech LLC timely appealed from the September 8, 2017 order. In its briefing Leech LLC only addressed the order's addition of Leech LLC as a judgment debtor. SMA did not cross-appeal the trial court's denial of attorney's fees and costs.

C. *SMA's Second Motion To Amend the Judgment*

On September 20, 2017 SMA again moved to amend the judgment to award postarbitration attorney's fees and costs (second motion for attorney's fees). SMA stated it brought its motion "to tie up the loose ends" after the court amended the judgment to add Leech LLC as a judgment debtor. SMA did not mention the court's denial of its first motion for attorney's fees, but it again requested attorney's fees and costs incurred since February 27, 2017 "in memorializing and enforcing the unpaid judgment against the proper entities," by then totaling

\$16,467.05. SMA attached declarations from Jones, SMA attorneys Matthew W. LaVere and Paul R. Huff, and paralegal Gracie Medina. Each of the declarations provided the declarant's hourly rate and the number of hours he or she spent "attempting to memorialize the Arbitrator's award into a court judgment and collect on said judgment" since February 27, 2017.

Whereas the first motion for attorney's fees sought to recover for 36 hours of attorney time (including four additional hours anticipated on the first motion), the second motion sought to recover the 36 hours plus the time spent on the second motion, for a total of 51 hours of attorney time; the second motion sought an additional \$136.64 in costs incurred after the filing of the first motion; and the second motion sought \$1,554.18 in interest accrued on the unpaid judgment since February 27, 2017.

Leech LLC filed an opposition, arguing the trial court lacked jurisdiction over SMA's second motion because Leech LLC's appeal from the trial court's order denying SMA's first motion for attorney's fees and costs deprived the trial court of jurisdiction to rule on the motion under section 916, subdivision (a).⁴ Leech LLC also contended SMA's motion was an improper motion for reconsideration, which did not meet the requirements of section 1008, subdivision (a),⁵ because it was not brought

⁴ Section 916, subdivision (a), provides, "[T]he perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order."

⁵ Section 1008 provides, "(a) When an application for an order has been made to a judge, or to a court, and refused in whole or in part, or granted, or granted conditionally, or on

within 10 days of the trial court's order, and SMA failed to provide "new or different facts, circumstances, or law in its affidavits in support of its motion." Leech LLP did not oppose the motion.

In its reply, SMA asserted that at the September 8, 2017 hearing on its first motion its counsel "expressly asked the Court if it would stay its decision on awarding post-arbitration fees and costs to allow SMA to provide the further detail requested by the Court. The Court responded that there was no need to stay that decision and rather specifically invited SMA to simply file a new motion." (*Italics and boldface omitted.*) SMA did not, however, provide any evidence to support this statement. SMA contended that because its second motion was brought at the trial court's invitation, the motion was not a motion for reconsideration.

terms, any party affected by the order may, within 10 days after service upon the party of written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order. The party making the application shall state by affidavit what application was made before, when and to what judge, what order or decisions were made, and what new or different facts, circumstances, or law are claimed to be shown. [¶] . . . [¶] (e) This section specifies the court's jurisdiction with regard to applications for reconsideration of its orders and renewals of previous motions, and applies to all applications to reconsider any order of a judge or court, or for the renewal of a previous motion, whether the order deciding the previous matter or motion is interim or final. No application to reconsider any order or for the renewal of a previous motion may be considered by any judge or court unless made according to this section."

Leech LLC filed a sur-response to SMA's reply, attaching a declaration from Alan M. Kindred, a partner of Leech LLP, who had appeared on behalf of Leech LLC at the September 8 hearing. Kindred stated counsel for SMA had requested to file supplemental briefing on its motion for attorney's fees and costs at the September 8 hearing, and the trial court "replied with words to the effect 'you had better file a motion.'" Kindred understood the court to mean "a motion for reconsideration or a renewed motion to amend the judgment." Kindred confirmed the parties waived notice of entry of the trial court's order at the September 8 hearing.

After a hearing, on December 8, 2017 the trial court adopted its written tentative ruling and granted SMA's second motion for attorney's fees and costs in part, awarding \$9,000 in attorney's fees. The court in its minute order noted it "denied [SMA's] first motion for this relief because [SMA] failed to support the motion with legal argument or analysis . . . and because [SMA] failed to provide sufficient facts to identify a reasonable amount of attorney's fees that should be added to the judgment." The court added, "Since the Court invited [SMA] to re-file [its] previously defective motion (which had been taken 'off calendar' before final ruling), the Court does not consider this a motion for reconsideration." The court also found Leech LLC's appeal did not deprive the court of jurisdiction because resolution of the issue whether Leech LLC was properly added as a judgment debtor would not affect SMA's motion for attorney's fees and costs.

The trial court declined to award any fees incurred by SMA in bringing the second motion because "[SMA's] first motion was denied for its procedural defects and lack of sufficient evidence,"

and it was “not reasonable to award this additional amount because it is not equitable or reasonable to require [Leech LLP] to pay fees that [SMA’s] counsel billed to correct a defective motion.”

The trial court denied SMA’s request for costs, finding it had not presented sufficient evidence. The court also denied SMA’s request for interest because SMA failed to “identify[] legal authority and offer argument in support of the relief requested.”

Leech LLP timely appealed.⁶

DISCUSSION

A. *The Trial Court Had the Inherent Authority To Reconsider Its September 8, 2017 Denial of SMA’s First Motion for Attorney’s Fees on Its Own Motion*

Leech LLP contends SMA’s second motion for attorney’s fees was untimely as a motion for reconsideration of the trial court’s ruling on SMA’s first motion for attorney’s fees, and therefore the trial court lacked jurisdiction to grant the second motion. SMA contends its second motion was not a motion for reconsideration because the trial court did not deny its first motion. Neither is correct. The second motion for attorney’s fees addressed the same fees the trial court rejected in ruling on the first motion, but the court had the inherent power on its own motion to reconsider that motion without exceeding its jurisdiction under section 1008.

Under section 1008, subdivision (a), “any party affected by the order may, within 10 days after service upon the party of

⁶ Although the notice of appeal was filed on behalf of both Leech LLP and Leech LLC, only Leech LLP has filed an opening brief.

written notice of entry of the order and based upon new or different facts, circumstances, or law, make application to the same judge or court that made the order, to reconsider the matter and modify, amend, or revoke the prior order.” Leech LLP is correct that although SMA’s motion was not styled as a motion for reconsideration, “[t]he name of a motion is not controlling, and, regardless of the name, a motion asking the trial court to decide the same matter previously ruled on is a motion for reconsideration under . . . section 1008.” (*J.W. v. Watchtower Bible and Tract Society of New York, Inc.* (2018) 29 Cal.App.5th 1142, 1171; accord, *Lennar Homes of California, Inc. v. Stephens* (2014) 232 Cal.App.4th 673, 681 [“The motion [for clarification], despite its label, was in substance a motion for reconsideration.”].)

Under section 1008, subdivision (e), the trial court generally has no jurisdiction to hear a motion for reconsideration that does not comply with the requirements of the section. (*Kinda v. Carpenter* (2016) 247 Cal.App.4th 1268, 1278 [“Any application for reconsideration must comply with the provisions of section 1008 in order for the court to consider the request.”]; *Kerns v. CSE Ins. Group* (2003) 106 Cal.App.4th 368, 391 [“[T]he procedural prerequisites set forth for reconsideration of orders and renewal of motions previously denied are jurisdictional as applied to the actions of parties to civil litigation.”].) SMA does not dispute its second motion for attorney’s fees asked the trial court to decide the same matter previously ruled on—SMA’s entitlement to attorney’s fees and costs under the agreement and promissory note. Neither does it contend its second motion was timely or procedurally compliant with section 1008.

However, Leech LLP (and SMA) ignore the “exception to section 1008’s ‘jurisdiction[all]’ . . . exclusivity.” (*Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* (2015) 61 Cal.4th 830, 840 (*Even Zohar*).) In *Even Zohar*, the Supreme Court explained it had previously held in *Le Francois, supra*, 35 Cal.4th at pages 1096 to 1097, that section 1008 “‘do[es] not limit a *court’s* ability to reconsider its previous interim orders on its own motion,’ even while it ‘prohibit[s] a *party* from making renewed motions not based on new facts or law’” (*Even Zohar*, at p. 840.) As the court in *Le Francois* observed, “If a court believes one of its prior interim orders was erroneous, it should be able to correct that error no matter how it came to acquire that belief. For example, nothing would prevent the losing party from asking the court at a status conference to reconsider a ruling.” (*Le Francois*, at p. 1108; accord, *Raines v. Coastal Pacific Food Distributors, Inc.* (2018) 23 Cal.App.5th 667, 683 [trial court did not err in reversing on its own motion its prior ruling on motion for summary judgment].)

SMA’s second motion for attorney’s fees falls within this exception under *Le Francois*. As the trial court explained in its December 8, 2017 ruling, “Since the Court invited [SMA] to re-file [its] previously defective motion (which had been taken ‘off calendar’ before final ruling), the Court does not consider this a motion for reconsideration.” Thus, as the trial court clarified in its December 8 order, it had invited the second motion “‘on its own motion.’” (*Even Zohar, supra*, 61 Cal.4th at p. 840; accord, *Le Francois, supra*, 35 Cal.4th at pp. 1096-1097.)

B. *Leech LLC's Appeal Did Not Deprive the Trial Court of Jurisdiction To Consider SMA's Second Motion for Attorney's Fees*

Generally, “the perfecting of an appeal stays proceedings in the trial court upon the judgment or order appealed from or upon the matters embraced therein or affected thereby, including enforcement of the judgment or order, but the trial court may proceed upon any other matter embraced in the action and not affected by the judgment or order.” (§ 916, subd. (a).) “The purpose of the automatic stay provision of section 916, subdivision (a) ‘is to protect the appellate court’s jurisdiction by preserving the status quo until the appeal is decided. The [automatic stay] prevents the trial court from rendering an appeal futile by altering the appealed judgment or order by conducting other proceedings that may affect it.’” (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 189 (*Varian*); accord, *LAOSD Asbestos Cases* (2018) 28 Cal.App.5th 862, 872.)

Leech LLP argues that because Leech LLC timely appealed from the trial court’s September 8, 2017 order, which included rulings on both the request to add Leech LLC as a judgment debtor and SMA’s first motion for attorney’s fees, section 916’s automatic stay deprived the trial court of jurisdiction to hear SMA’s second motion for attorney’s fees because the first attorney’s fees ruling was part of the “order appealed from.” SMA responds that section 916’s automatic stay does not apply because SMA’s second motion for attorney’s fees was not “embraced” or “affected” by Leech LLC’s appeal of the

September 8, 2017 order.⁷ We conclude the trial court’s ruling on SMA’s first motion for attorney’s fees was not part of the “order appealed from” under section 916 and not embraced or affected by Leech LLC’s appeal.

“Only aggrieved parties may appeal. (. . . § 902.) ‘One who is not aggrieved by a decision of the lower court has no right of appeal therefrom.’” (*In re Tobacco Cases I* (2010) 186 Cal.App.4th 42, 53 (*Tobacco Cases I*); accord, *Jones & Matson v. Hall* (2007) 155 Cal.App.4th 1596, 1611 [dismissing defendants’ cross-appeal where appealed judgment and orders were rendered in defendants’ favor]; *Hensley v. Hensley* (1987) 190 Cal.App.3d 895, 897 [dismissing appeal from order setting aside default judgment where defendants argued on appeal default judgment should be reinstated awarding \$0 in damages].)

Had the trial court issued two orders on September 8, one granting the request to add Leech LLC as a judgment debtor and another denying SMA’s motion for attorney’s fees, Leech LLC would not have had a right to appeal from the court’s favorable ruling denying SMA’s first motion for attorney’s fees. The fact SMA filed a single motion resulting in the September 8, 2017 order does not render the part of the order denying SMA’s first motion for attorney’s fees appealable by Leech LLC. (See *Doe v. Luster* (2006) 145 Cal.App.4th 139, 150 [“There similarly is no creditable argument that combining the two motions—[an anti-

⁷ SMA also contends Leech LLC’s appeal does not embrace the denial of its first motion for attorney’s fees because the trial court never ruled on SMA’s first motion for attorney’s fees, instead taking the matter “‘off calendar’ before [the] final ruling.” Because we conclude the trial court denied SMA’s first motion for attorney’s fees, we reject this argument.

SLAPP motion] that results in an immediately appealable order; [and a motion for attorney's fees] that does not—somehow transforms the nonappealable order into one that is appealable.”].)

Tobacco Cases I is instructive. There, defendant R.J. Reynolds Tobacco Company (Reynolds) appealed from an order granting the People of the State of California's motion to enforce a consent decree, which included a request for sanctions. (*Tobacco Cases I, supra*, 186 Cal.App.4th at p. 44.) The trial court granted the People's motion on the merits, and determined sanctions were available under the terms of the consent decree, but exercised its discretion not to impose sanctions. (*Id.* at pp. 46-47.) On appeal, Reynolds challenged both the trial court's merits ruling and its determination the consent decree could support a sanctions award. (*Id.* at p. 45.) The Court of Appeal declined to address Reynolds's contentions on the sanctions ruling, explaining, “Since Reynolds was not aggrieved by the court's denial of sanctions, and there was no declaratory relief on the legal basis for sanctions, no actual relief is available on appeal.” (*Id.* at p. 53.)

Here, as in *Tobacco Cases I*, Leech LLC could not have appealed from the part of the September 8, 2017 order denying SMA's first motion for attorney's fees because Leech LLC was not aggrieved by the denial. Because Leech LLC had no right to appeal the denial of SMA's first motion for attorney's fees, we conclude the trial court's ruling on SMA's first motion for attorney's fees was not part of the “order appealed from” under section 916. Further, to the extent Leech LLC purported to appeal from the trial court's attorney's fee ruling, an appeal from a nonappealable order (as to Leech LLC) does not divest the trial

court of jurisdiction. (*Maxwell v. Superior Court* (1934) 1 Cal.2d 294, 297; *Holloway v. Quetel* (2015) 242 Cal.App.4th 1425, 1431, fn. 6; *Hopkins & Carley v. Gens* (2011) 200 Cal.App.4th 1401, 1409, fn. 4.)

We similarly conclude SMA's second motion for attorney's fees was not embraced in or affected by Leech LLC's appeal of the September 8, 2017 order. "In determining whether a proceeding is embraced in or affected by the appeal, we must consider the appeal and its possible outcomes in relation to the proceeding and its possible results. '[W]hether a matter is "embraced" in or "affected" by a judgment [or order] within the meaning of [section 916] depends on whether postjudgment [or postorder] proceedings on the matter would have any effect on the "effectiveness" of the appeal.' [Citation.] 'If so, the proceedings are stayed; if not, the proceedings are permitted.'" (*Varian, supra*, 35 Cal.4th at p. 189; see p. 195, fn. 8 [appeal from an anti-SLAPP motion automatically stays all further trial court proceedings on the merits only as to those causes of action affected by the motion]; *URS Corp. v. Atkinson/Walsh Joint Venture* (2017) 15 Cal.App.5th 872, 882 [appeal from trial court's grant of motion to disqualify attorney stays enforcement of the attorney disqualification order, but not unrelated trial court proceedings].)

Generally, a trial court retains jurisdiction to award attorney's fees after the entry of a judgment or order, notwithstanding an appeal from the judgment or order. (See *Carpenter v. Jack in the Box Corp.* (2007) 151 Cal.App.4th 454, 463 ["The perfecting of defendants' appeal . . . did not automatically stay proceedings in the trial court to award fees and costs under [the anti-SLAPP statute]."]; *Hoover Community*

Hotel Development Corp. v. Thomson (1985) 168 Cal.App.3d 485, 487 [appeal from grant of defendants’ summary judgment motion did not deprive trial court of jurisdiction to consider defendants’ request for attorney’s fees and costs because costs, “though embraced in the action, . . . was . . . incidental to the merits” of the appeal]; *In re Marriage of Sherman* (1984) 162 Cal.App.3d 1132, 1140 [order granting attorney’s fees following appeal of order denying termination of spousal support “is one concerning a ‘matter embraced in the action [which is] not affected by the . . . order’ previously appealed from”].) We see no reason to reach a different result here.

Because Leech LLC’s appeal focused only on the addition of Leech LLC as a judgment debtor, the purpose of section 916 “to protect the appellate court’s jurisdiction by preserving the status quo” would not be served by applying an automatic stay to a future motion for attorney’s fees. (*Varian, supra*, 35 Cal.4th at p. 189.) Likewise, the trial court’s ruling on the second motion for attorney’s fees will not “have any effect on the “effectiveness” of the appeal.” (*Ibid.*) Thus, section 916 did not deprive the trial court of jurisdiction over SMA’s second motion for attorney’s fees.⁸

⁸ For the first time in its reply brief, Leech LLP argues the July 6, 2017 judgment extinguished SMA’s contractual right to attorney’s fees under the asset purchase agreement and the amendment to the agreement. We do not consider this new issue, which was not raised in Leech LLP’s opening brief. (*City of Palo Alto v. Public Employment Relations Bd.* (2016) 5 Cal.App.5th 1271, 1291, fn. 3 [““Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument.””]; *Aptos Council v. County of Santa Cruz* (2017)

DISPOSITION

The order is affirmed. SMA is to recover its costs on appeal.

FEUER, J.

WE CONCUR:

PERLUSS, P. J.

SEGAL, J.

10 Cal.App.5th 266, 296, fn. 7 [“Issues not raised in the appellant’s opening brief are deemed waived or abandoned.”].)